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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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FRANK MARSH, STATE TREASURER, ET AL., PETITIONERS

*v.*

ERNEST CHAMBERS

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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### INTEREST OF THE UNITED STATES

This case concerns the constitutionality of the Nebraska Unicameral Legislature's chaplaincy practice under the Establishment Clause of the First Amendment. The United States has a substantial interest in this matter because the United States Congress has, since the first session of the Continental Congress in 1774, appointed chaplains to open each legislative day with an invocation. Over a half-century ago, a challenge to the constitutionality of the federal chaplaincy practice was dismissed for lack of standing. *Elliott* v. *White*, 23 F.2d 997 (D.C. Cir. 1928). A similar challenge is now pending before the United States Court of Appeals for the District of Columbia Circuit for determination by the court en banc of whether the suit must be dismissed on standing or political question grounds. *Murray* v. *Buchanan*,

No. 81-1301 (Mar. 9, 1982), vacated and scheduled for rehearing en banc by orders of May 25 and July 16, 1982.

Although the constitutionality of the chaplaincy practice of the Senate and House of Representatives may not be justiciable, that issue has not been finally resolved by this Court. But see *Abington School District* v. *Schempp*, 374 U.S. 203, 300 (1963) (Brennan, J., concurring).[1] Accordingly, the United States retains a keen interest in the Court's ruling in this case because the Nebraska Legislature's chaplaincy bears many basic similarities to the congressional chaplaincies. Moreover, the Nebraska practice is clearly patterned after the longstanding practice of Congress and the other states; thus, the Court's consideration of Nebraska's practice would be enhanced by a complete exposition of the federal experience.

## SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment is not violated by the Nebraska Legislature's appointment and compensation of a chaplain to open each day's legislative session with a prayer. The constitutionality of paid legislative chaplaincies is conclusively demonstrated by the fact that the Members of the First Congress appointed and compensated chaplains to open their daily sessions at the same time that they drafted the First Amendment; historical analysis thus shows that the Framers did not intend to invalidate their own chaplaincy, nor those of the states. But, even if more need be shown, the constitutional propriety of the Nebraska chaplaincy is confirmed by application of the now traditional three-part Estab-

[1] With regard to the question of standing to challenge a legislative chaplaincy, we note that the courts below held that respondent Chambers had standing to challenge the Nebraska practice not merely as a state taxpayer but as a member of the State Legislature who personally confronts the morning invocation on a daily basis (Pet. App. 22 n.3, 23-24 n.14, 28-29). This circumstance distinguishes the standing issue in this case, which petitioners do not press in this Court, from the federal taxpayer standing issue involved in *Murray* v. *Buchanan*, *supra*.

lishment Clause test announced by the Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

1. At the national level, the designation of legislative chaplains originated with the first session of the Continental Congress in September 1774 and was carried forward by the First Congress convened under the Constitution. Indeed, the very first congressional compensation act included authority to pay "each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress." Act of Sept. 22, 1789, ch. XVII, Section 4, 1 Stat. 71.

Just three days after enactment of the congressional compensation statute, the Members of the First Congress reached final agreement on the wording and content of the Bill of Rights, including the Establishment Clause, and referred the proposed amendments to the states for ratification. See 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 26 (1789); 1 Journal of the Senate, 1st Cong., 1st Sess. 16 (1789). It is apparent from this simultaneous consideration by the First Congress of the appointment and compensation of chaplains, on the one hand, and the framing of the Establishment Clause, on the other, that the Members of the First Congress did not consider their own legislative chaplaincy to run afoul of the Establishment Clause. It should therefore come as no surprise that the congressional chaplaincy practice continued without interruption after the Bill of Rights became part of the Constitution on December 15, 1791. That being so, Nebraska's virtually identical practice is equally permissible under the Establishment Clause, which is made applicable to the states by incorporation into the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

2. In light of the historical evidence of the Framers' intent, it should not be necessary to analyze the Nebraska chaplaincy further under the three-part test announced by this Court in *Lemon* v. *Kurtzman*, *supra*. The *Lemon* test is merely a device for discerning the proper meaning of the Establishment Clause and for applying its

restrictions in a modern-day context. In this case, where the challenged practice is one that was actually engaged in by the Framers themselves, and where the intended meaning and scope of the Establishment Clause in this context is clear, application of the *Lemon* test would seem superfluous. Nevertheless, a review of the Nebraska chaplaincy under that test confirms that the legislative chaplaincy practice is constitutionally sound.

The district court found, and the trial record reflects, that the Nebraska chaplain's opening invocation has the "clearly secular purpose" of "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner" (Pet. App. 13). The trial court also found on the basis of the record that the opening invocation does not have a primary effect of advancing or inhibiting religion (Pet. App. 14-15). Finally, the district court found no evidence to indicate that Nebraska's legislative chaplaincy has resulted in an excessive governmental entanglement with religion (Pet. App. 18).

The court of appeals' disagreement with the district court was based solely on its own assumptions, and those assumptions cannot withstand reasoned analysis. The court's main objections to the Nebraska practice "viewed as a whole" (Pet. App. 34) were the chaplain's lengthy tenure, the resulting fact that only one religious denomination has been represented in the chaplaincy for many years, and the fact that the chaplain receives compensation for performing his duties (Pet. App. 36, 38). None of these features distinguishes the Nebraska chaplaincy from the traditional federal practice or, for that matter, from the Massachusetts practice upheld in *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195 (1979).

In any event, the length of a particular chaplain's service as a legislative officer and the particular religious denomination to which he subscribes is wholly irrelevant to his secular purpose of bringing the legislature to order in a traditional, ceremonial manner that establishes a proper tone of solemnity for the day's proceedings. The

record in this case establishes that the Nebraska chaplain's prayers are nondenominational and that he advocates no particular religious dogma. Accordingly, his formal religious affiliation is of no particular concern.

Furthermore, once it is shown that the chaplain performs a predominantly secular function, there can be no legitimate constitutional objection to paying for his services any more than one could object to paying any of Nebraska's other legislative officers. See, *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 746 & n.13 (1976) (plurality opinion).

Finally, this Court has observed in a similar Establishment Clause setting that "an unbroken practice * * * is not something to be lightly cast aside." *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970). This Nation has employed legislative chaplains for over 200 years without posing any threat to religious liberty. In light of this history, it cannot be plausibly suggested that the legislative chaplaincy is "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*ibid.*).

## ARGUMENT

### THE NEBRASKA LEGISLATURE'S APPOINTMENT AND COMPENSATION OF A CHAPLAIN TO OPEN EACH DAY'S SESSION OF THE LEGISLATURE WITH A PRAYER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Beginning in 1855, even before attaining statehood, Nebraska opened the daily sessions of its Legislature with a prayer by the chaplain (Pet. App. 11, 22 n.5). In 1867, the year Nebraska became a state, the Legislature provided that the chaplain would be a compensated officer with the duty of opening each legislative session with a prayer (*id.* at 11, 23 n.6). This practice has remained unchanged to the present day; the Rules of the Nebraska Unicameral Legislature provide that "Prayer by the

Chaplain" shall be the first item on the agenda, to precede even the taking of the "Roll cali" (Rule 7A, Section 1(b)) (Pet. 5).

The Nebraska Legislature is not alone in establishing this kind of chaplaincy practice. Every state of the Union opens its legislative sessions with a prayer and, like Nebraska, 17 other states utilize a salaried chaplain for this purpose. See *Colo* v. *Treasurer & Receiver General, supra*, 392 N.E.2d at 1197. In addition, as previously mentioned, each House of the United States Congress appoints and compensates a chaplain whose duty it is to open each day's session with a prayer. See United States Senate Rule IV; United States House of Representatives Rule VII. It is apparent that the Nebraska chaplaincy practice instituted in 1855 grew out of the traditional legislative ceremonial practice already long-established in the existing states as well as in the federal Congress.

An examination of the history of legislative chaplaincies in the United States and the experience of the Congress before, during and after ratification of the First Amendment reveals that the Framers did not intend to invalidate under the Establishment Clause the kind of legislative chaplaincy that now exists in Nebraska.[2] The historical evidence of the Framers' intent is so conclusive that no further inquiry should be necessary in order to determine that the Nebraska chaplaincy is constitutionally permissible. Nevertheless, as we show in Part B of this brief, the Nebraska chaplaincy also passes constitutional muster under the now familiar three-part test articulated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

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[2] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." Those provisions have been made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

### A. The Historical Evidence Conclusively Shows That the Establishment Clause of the First Amendment Does Not Proscribe the Practice of Opening a Legislature's Day with Prayer by a Compensated Chaplain

This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). See also *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676 (1970). The Court has often undertaken a thorough historical examination in order to shed light on the meaning and proper application of the Establishment and Free Exercise Clauses to particular circumstances, and it has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*" (*id.* at 671; emphasis added). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) (history of Sunday Closing Laws relevant to Establishment Clause inquiry); *Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947) (history of period when Establishment Clause was fashioned and adopted is relevant to determination of validity of modern state law authorizing reimbursement for student transportation to private schools).

In the instant case, the appropriateness of historical review is more compelling, and the results are more instructive and conclusive, than in any Establishment Clause case previously considered by this Court. The very governmental practice challenged here—the utilization of a salaried chaplain to open daily legislative sessions with a prayer—is one that predated the Constitution, was adopted by the Founding Fathers from the outset of the First Congress convened under the Constitution, was continued by the Framers of the First Amendment while the Establishment Clause itself was being fashioned and rati-

fied by the states, and has continued substantially unchanged to the present day.[3]

1. The origins of the congressional chaplaincies can be traced to the American colonies. See, *e.g.*, Journal of the House of Burgesses of Virginia 34, 36 (Nov. 20 & 21, 1712); Votes and Proceedings of the Lower House of Assembly of the Province of Maryland 4 (Dec. 12, 1754). In Virginia, for example, the first item of business at the Virginia Colony Convention of Delegates was a resolution "[t]hat the Reverend Thomas Price be appointed chaplain to this Convention, and that he be desired to read prayers every morning at 10 o'clock." Proceedings of the Virginia Convention of Delegates, 1775-1776, at 59 (Dec. 5, 1775). At the conclusion of the session, the Convention provided for allowances "to the several officers of this Convention," including the chaplain (*id.* at 102 (Jan. 20, 1776)).

Virginia continued this chaplaincy practice when its legislature convened for the first time under the state constitution on October 7, 1776. The House of Delegates ordered that "the several officers of the late Convention be continued officers of this House" and further prescribed that "the Chaplain attend to read prayers every morning at seven o'clock * * *." Journal of the House of Delegates

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[3] Thus, the lesson of history in this case is even clearer than in *Walz*, where the Court carefully considered and placed substantial emphasis on the lengthy history of tax exemptions for places of worship. See 397 U.S. at 676-680. The earliest federal taxing statute cited in *Walz* that could be regarded as incorporating a tax exemption for church property was enacted by Congress in 1798—seven years after the ratification of the First Amendment. See 397 U.S. at 677 n.5. In contrast, the United States Congress' practice of appointing and compensating its legislative chaplains for the purpose of delivering opening prayers began in the First Congress, continued during the framing of the First Amendment, and remained intact after the First Amendment's adoption in 1791. See A. Stokes & L. Pfeffer, *Church and State in the United States* 83-84, 478-482 (Harper & Rowe rev. 1st ed. 1964).

of Virginia 1 (Oct. 7, 1776). Other state legislatures adopted similar chaplaincy practices.[4]

2. At the national level, the designation of legislative chaplains can be traced to the first session of the Continental Congress in September 1774, where the delegates resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited Episcopalian clergyman—the Reverend Jacob Duché. 1 Journals of the Continental Congress 26 (1774) (hereinafter cited as "Journals").[5] Accordingly, the first opening prayer was recited on September 7, 1774 (*id.* at 27). Reverend Duché was subsequently invited back to deliver an opening prayer on May 11, 1775, the second day of the second session of the Continental Congress. 2 Journals 12, 13 (1775). In July 1776, Reverend Duché was "appointed chaplain to Congress" and charged with opening each day's proceedings on a regular basis. 5 Journals 530 (1776). Upon his resignation on October 17, 1776, the Continental Congress voted a $150 stipend for his services. 6 Journals 886-887 (1776).

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[4] See Journal of the Proceedings of the General Assembly of the State of Vermont 7, 63 (Feb. 23 & Mar. 9, 1784); Journal of the House of Representatives of the Commonwealth of Massachusetts 350 (Mar. 14, 1785); Journals of the Proceedings of the Senate and House of Representatives of the State of New Hampshire 66, 100 (Feb. 19 & 23, 1785).

[5] By letter of September 16, 1774, John Adams described this event to Abigail Adams in the following manner:

> When the Congress first met, Mr. Cushing made a Motion, that it should be opened with Prayer. It was opposed by Mr. Jay of N. York and Mr. Rutledge of South Carolina, because we were so divided in religious Sentiments, some Episcopalians, some Quakers, some anabaptists, some Presbyterians, and some Congregationalists, so that We could not join in the same Act of Worship. Mr. S. Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same Time a Friend to his Country.

Letter from John Adams to Abigail Adams (Sept. 16, 1774) *reprinted in* P. Smith, 1 *Letters of Delegates to Congress, 1774-1789*, at 74 (1976). See also H.R. Rep. No. 124, 33d Cong., 1st Sess. 2 (1854) (Mr. Webster's account).

Within a short time, on December 23, 1776, the Continental Congress elected two new chaplains—the Reverends Patrick Allison and William White. 6 Journals 1034 (1776). Eight years later, the Continental Congress decided that elections for these officers should be held annually. 27 Journals 683 (1784).

3. The practice of appointing chaplains to serve during legislative sessions continued from the very outset of the First Congress convened under the Constitution.[6] The First Congress met in April 1789, and among its first items of business was the selection of chaplains. See 1 Journal of the Senate, 1st Cong., 1st Sess. 10 (1789) (hereinafter "Senate J."); 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 11-12 (1789) (hereinafter "House J."). The House and Senate soon agreed that "two Chaplains of different denominations be appointed to Congress," one to be elected by each House and

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[6] At the Federal Constitutional Convention, Benjamin Franklin had proposed that each day's session be opened with prayer. His motion was made on June 28, 1787, more than a month after the convention began, and no action was taken on it. See 5 J. Elliot, *Debates on the Adoption of the Federal Constitution* 253-255 (2d ed. 1836) (1st ed. 1830). Among other things, the delegates were concerned about lack of funds for a chaplain's pay and the fact that institution of a prayer practice at that late date might highlight the absence of prayers at the prior sessions. *Ibid.*; see also, A. Stokes & L. Pfeffer, *supra*, at 84. It should also be noted that at least six ratifying conventions (Massachusetts, Connecticut, New Jersey, New York, Rhode Island, and Virginia) elected chaplains as officers or had visiting ministers deliver opening prayers. See Debates, Resolutions and Other Proceedings of the Convention of the Commonwealth of Massachusetts 24 (Jan. 9, 1788); 2 J. Elliot, *supra*, at 2; Litchfield Monitor (Conn.) 5 (Jan. 14, 1788); Pennsylvania Packet (Dec. 15, 1787); New Jersey Minutes of the Convention 7 (Dec. 13, 1787); Journal of the Convention of New York 7 (June 17, 1788); W. Staples, *Rhode Island in the Continental Congress, 1765-1790*, at 668, 670, 674 (1971); Debates and Other Proceedings of the Convention of Virginia 13 (June 2, 1788); 3 J. Elliot, *supra*, at 1. The Virginia Convention compensated its appointed chaplain for his services. Debates and Other Proceedings of the Convention of Virginia, *supra*, at 470; 3 J. Elliot, *supra*, at 657.

interchanged weekly. 1 Senate J. 12; 1 House J. 16. The Senate elected the first chaplain on April 25, 1789, and the House elected the second chaplain on May 1. 1 Senate J. 16; 1 House J. 26.

A few months later, the first statutory authority for compensation of members and officers of the House and Senate was enacted. Act of Sept. 22, 1789, ch. XVII, 1 Stat. 70. Included in the provisions for compensation of officers was authority to pay "each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress" (Section 4, 1 Stat. 71).

During this same period of time, Members of Congress had been conferring on a draft of the Bill of Rights, including provisions of the First Amendment. James Madison, whose leading role in the drafting and adoption of the First Amendment has been widely acknowledged,[7] introduced the initial draft of the Bill of Rights in the House on June 8, 1789. See II B. Schwartz, *The Bill of Rights: A Documentary History* 1026 (1971). With respect to religious liberties, this draft provided that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established * * *" (*ibid.*). During the course of debate, this language was modified to its current form in the Free Exercise and Establishment Clauses. See *Everson* v. *Board of Education*, *supra*, 330 U.S. at 39 n.27 (Rutledge, J., dissenting). Final agreement on the wording and content of the Bill of Rights was reached by both Houses of Congress on September 25, 1789—just three days after enactment of the legislation providing compensation for the congressional chaplains. 1 House J. 121; 1 Senate J. 88. The first proposed amendments to the Constitution were then referred to the several states for ratification.

It is apparent from this simultaneous consideration by the First Congress of the appointment and compensation of chaplains, on the one hand, and the framing of the Es-

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[7] See, *e.g.*, *Everson* v. *Board of Education*, *supra*, 330 U.S. at 13; *id.* at 28, 31-43 (Rutledge, J., dissenting).

tablishment Clause, on the other, that the Members of the First Congress neither perceived nor intended any friction between legislative chaplaincies and the First Amendment. Indeed, James Madison himself was a member of the House Committee that proposed appointment of a chaplain. See 1 House J. 12. And he voted in favor of the bill to compensate the officers of the House and Senate, including the two chaplains (*id.* at 108-109).[8]

The Bill of Rights was ratified on December 15, 1791, when the Virginia Senate approved it. See II B. Schwartz, *supra*, at 1202. In the first session of Congress after the ratification of the First Amendment (the Second Session of the Second Congress), the House and Senate continued their practice of electing chaplains. See 1 Journal of the House of Representatives, 2d Cong., 2d Sess. 610 (1792); 1 Journal of the Senate, 2d Cong., 2d Sess. 452 (1792). And when the Fourth Congress authorized compensation for officers of the House and Senate, it again provided for compensation to the chaplains. Act of Mar. 10, 1796, ch. IV, Section 3, 1 Stat. 449.

4. This chaplaincy practice in the United States Congress has remained essentially unchanged throughout its history of almost two centuries.[9] In the middle of the

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[8] Madison apparently changed his mind on the chaplaincy question in later years. In his letter of July 10, 1822, to Edward Livingston, Madison indicated that he did not approve of the practice. See 9 Writings of James Madison 100 (G. Hunt ed. 1910). And in his "Detached Memoranda," Madison elaborated further on his objections. See L. Pfeffer, *Church State and Freedom* 248-249 (Beacon Press rev. ed. 1967), quoting E. Fleet, *Madison's "Detached Memoranda," III William and Mary Quarterly* 558-559 (1946). These objections, however, came more than three decades after the First Congress appointed its chaplains in 1789 and the states ratified the First Amendment in 1791. They do not reflect Madison's beliefs while serving in the First Congress.

[9] Two matters warrant mention in this regard. First, for a brief time during the 1850's, both Houses of Congress temporarily abandoned the practice of electing regular chaplains and instead invited local clergymen to officiate on a rotating basis. See Cong. Globe, 35th Cong., 1st Sess. 14, 28 (1857). Dissatisfaction with this procedure, however, soon led to a return to the annual appointment

last century, there was considerable discussion within the Congress itself over the constitutionality and desirability of maintaining federal chaplaincies in the House and Senate as well as in the military. See A. Stokes & L. Pfeffer, *supra*, at 479-480. Various memorials and petitions by citizens were referred to the House and Senate Committees on the Judiciary for consideration. The committee deliberations resulted in the issuance of three reports—in 1850, 1853 and 1854—tracing the history of the federal chaplaincies in this country and concluding that they were sound both as a matter of constitutional jurisprudence and public policy. See H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850); S. Rep. No. 376, 32d Cong., 2d Sess. (1853); H.R. Rep. No. 124, 33d Cong., 1st Sess. (1854).

Of particular relevance is the following passage from the 1853 Senate Report (S. Rep. No. 376, *supra*, at 4):

> [F]rom the beginning, our government has had chaplains in its employment. If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government—

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of chaplains as officers of each House. See Cong. Globe, 36th Cong., 1st Sess. 97-98, 162 (1859); *id.* at 1016 (1860).

Second, although the Senate and House have always selected their own chaplains, the original agreement between the Houses contemplated that each House's chaplain would be of a different denomination and would be exchanged on a weekly basis with the other House. See 1 Senate J. 12; 1 House J. 16. This practice was abandoned in 1856, when the House elected a chaplain without making any provision for weekly rotation. See Cong. Globe, 34th Cong., 1st Sess. 486 (1856). Since that time, each House of Congress has elected its own chaplain without reference to the other House. As it happens, however, the two Houses have continued to elect chaplains of different denominations. Compare Chaplains of the United States Senate, April 25, 1789 to Date (December 8, 1982), on file in the Office of the United States Senate Historian, with *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965). (We have lodged a copy of these documents with the Clerk of this Court.)

> were in Congress and in the Presidency when this constitutional amendment was adopted? They were wise to discover the true character of the measure; they, if any one did, understood the true purport of the amendment, and were bound, by their duty and their oaths, to resist the introduction or continuance of chaplains, if the views of the petitioners were correct. But they did no such thing; and therefore we have the strongest reason to suppose the notion of the petitioners to be unfounded. Unfounded it no doubt is.

5. When viewed and understood in light of this history, the practice of appointing and compensating a chaplain to open each day's legislative session with a prayer must be sustained. This Court has previously observed that a construction of the Constitution made by the First Congress is of special and compelling significance: "It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-329 (1936). Indeed, such a construction of the Constitution by the Founding Fathers and Framers has been accorded conclusive effect (*Myers* v. *United States*, *supra*, 272 U.S. at 175):

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

There is no reason to depart from this settled principle in this case. The Framers of the Establishment Clause themselves perceived no constitutional objection to legislative chaplaincies. Half a century later, committees of the Thirty-First, Thirty-Second, and Thirty-Third Congresses specifically examined this question and reaffirmed

the judgment of the Framers.[10] Moreover, as this Court has observed in an Establishment Clause context, using the words of Justice Holmes: " 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Although it is the Nebraska Legislature's chaplaincy—and not those of the United States Congress—that is challenged in this case, the foregoing principles are equally controlling. The Establishment Clause applies with full force to the several states by incorporation into the Due Process Clause of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). It is hardly plausible that the Establishment Clause could be construed to permit the federal congressional chaplaincies but, at the same time, impose a more stringent standard on the state legislatures—like Nebraska—that have similar chaplaincy practices. Any such construction would be ironic, indeed, because the First Amendment itself is directed solely to the Congress and was not intended to interfere with the various established state religions existing at the time of ratification. See *McGowan* v. *Maryland*, 366 U.S. 420, 440-441 (1961). If, as demonstrated above, the Framers did not intend the Establishment Clause to proscribe the congressional chaplaincies, then the Clause a fortiori does not proscribe similar chaplaincies in the state legislatures.

6. The court of appeals found the Nebraska chaplaincy to be constitutionally objectionable because "[f]or sixteen years, the Nebraska legislature has selected and paid one minister, representing one denomination, to open each

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[10] See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

legislative session with prayer" (Pet. App. 36).[11] These features singled out by the Eighth Circuit for special opprobium—lengthy tenure, compensation, and single denomination[12]—do not meaningfully distinguish the Nebraska practice from the kind of legislative chaplaincy approved by the Framers and early Congresses.

As indicated above (see pages 11-12, *supra*), the congressional chaplains have been paid as officers of the House and Senate since the very first congressional compensation act in 1789. Moreover, the length of service of the congressional chaplains has never been a matter of particular concern. One chaplain of the House, for example, served for 26 years, from 1895 to 1921; and he was succeeded by another chaplain who held that office for 29 years, until 1950. See *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965).

As for denominational variety, it is true that, during the first half-century of the congressional chaplaincy practice, Congress explicitly provided that each House would appoint a chaplain of a different denomination. But the denominations have all been Protestant, with the sole exception of the Catholic Reverend Pise, who served the Senate for a single year in 1832. See A. Stokes & L.

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[11] The court of appeals also objected to the state legislature's publication of prayer books (Pet. App. 36, 38), which occurred only in the years 1975, 1978 and 1979 (Pet. App. 8). As pointed out by petitioners, however, the district court's injunction against the prayer book practice was not appealed and was therefore not before the court of appeals (Pet. 22-23). See note 22, *infra*. In any event, we note that Congress has also occasionally ordered the publication of its chaplains' prayers. See A. Stokes & L. Pfeffer, *supra*, at 478.

[12] We note that the court of appeals' statement that the Nebraska chaplain has been the "exclusive source" (Pet. App. 38) of the opening prayers is factually incorrect. The Nebraska Legislature, like the United States Congress, has on occasion invited other ministers of different denominations and faiths to officiate at the opening prayer (see Pet. App. 20).

Pfeffer, *supra*, at 478-479. It appears that no particular attention has been paid to this matter within each House. Thus, for example, the first eight chaplains appointed by the Senate—serving over a period of 18 years, from 1789 to 1807—were all Episcopalians (Chaplains of the United States Senate, April 25, 1789 to Date (December 8, 1982), on file in the Office of the United States Senate Historian). Similarly, the first three chaplains appointed by the House of Represenatives—serving over a period of 11 years, from 1789 to 1800—were all Presbyterians (*History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965)).

The Eighth Circuit's real objection in this case was not to the fact that only *one person* has served as chaplain in Nebraska for some 16 years, but that only *one denomination* has been represented during that time. Presumably, it would have made no difference to the court of appeals if Nebraska had appointed eight different chaplains of a single denomination over this same 16-year period. Yet, that is precisely what the United States Senate in the first and succeeding Congresses did in the first 18 years of federal government under the Constitution.

Moreover, as recognized by the Supreme Judicial Court of Massachusetts in a case nearly identical to the present case, the question of denominational tenure is more properly viewed as an equal protection challenge then a First Amendment issue. The Massachusetts court rejected such a challenge, explaining that "[t]he mere fact that two persons of a particular faith have been appointed to these positions [legislative chaplains] over the past twenty years does not demonstrate that any other person has ever been denied appointment (a necessary element of any equal protection claim), or that such decisions were based on religious discrimination." *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195, 1199 (1979).

Congress itself has placed great emphasis on the fact that Members are free to select chaplains from any denomination whatsoever, and has concluded that this

freedom of choice negates any possibility of an "establishment of religion." As explained by the Senate Committee on the Judiciary in the 1853 report mentioned above (S. Rep. No. 376, *supra*, at 2-3; emphasis added):

> At every session two chaplains are elected * * *. Now, in this, no religion, no form of faith, no denomination of religious professors, is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. * * * The chaplain is an officer of the house which chooses him, and nothing more. He owes his place not to his belonging to a particular religious society, or holding a particular faith, but to the voluntary choice of the members of the house, and stands, in this respect, upon the same footing with any other officer so elected.
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> * * * * *
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> *True, selections, in point of fact, are always made from some one of the denominations into which Christians are distributed; but that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment.*

The same is true with respect to the Nebraska Legislature, which appoints the chaplain, along with other legislative officers, in accordance with the vote of its members (Tr. 115-121).[18]

Thus, the Nebraska chaplaincy does not deviate in any constitutionally significant way from the kind of legislative chaplaincy envisioned and practiced by the Framers themselves. Accordingly, the Nebraska chaplaincy does not constitute a law or practice "respecting an establishment of religion" within the meaning of the Establishment Clause of the First Amendment.

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[18] "Tr." refers to pages of the transcript of testimony at the trial held in this case on December 1, 1980.

### B. Application of the Three-Part *Lemon* v. *Kurtzman* Test Confirms that the Nebraska Chaplaincy Does Not Offend the Establishment Clause of the First Amendment

In *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952), this Court observed that "[t]he First Amendment * * * does not say that in every and all respects there shall be a separation of Church and State." If the rule were otherwise, a number of anomalies would result (*id.* at 312-313; emphasis added):

> [T]he state and religion would be aliens to each other —hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. *Prayers in our legislative halls*; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." [14]

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[14] See also, *Abington School District* v. *Schempp*, 374 U.S. 203, 213 (1963) (Court speaks approvingly of evidence of recognition of God in public life, including the fact that "each House of the Congress provides through its Chaplain an opening prayer"); *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962) (Court speaks approvingly of "patriotic or ceremonial occasions" where "there are many manifestations in our public life of belief in God").

Individual Justices of this Court have expressed similar views in separate concurring or dissenting opinions. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 299-300 (footnote omitted) (Brennan, J., concurring) ("The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements

It is no wonder that there are numerous recognitions of God in public life, for "this Nation's history has not been one of entirely sanitized separation between Church and State," and "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). Thus "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614. At most, the "concept of a 'wall' of separation is a useful signpost." *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 7.

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of the kind prohibited by the Establishment Clause"); *Engel* v. *Vitale*, *supra*, 370 U.S. at 446-450 (Stewart, J., dissenting) (recounts with approval the many religious traditions remaining in government, including the congressional chaplaincies); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 253-254 (1948) (Reed, J., dissenting) (cites examples of permissible federal involvement with religion, including the daily invocations by the congressional chaplains). But see *Engel* v. *Vitale*, *supra*, 370 U.S. at 437-444 (Douglas, J., concurring) (advocates a rule of virtually absolute and total separation of church and state). Other federal and state courts have also dealt with various public recognitions of God and have found them constitutionally unobjectionable. See, *e.g.*, *Bogen* v. *Doty*, 598 F.2d 1110 (8th Cir. 1979) (opening prayer by local clergymen at county board meetings); *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970) ("In God We Trust" motto on federal currency); *O'Hair* v. *Cooke*, Civil Action No. A-77-CA-236 (W.D. Tex. filed Jan. 29, 1980) (opening invocation by local clergyman at city council meetings), aff'd mem., 638 F.2d 1231 (5th Cir.), cert. denied, 454 U.S. 824 (1981) (petition also raised issue of Fifth Circuit court crier's reference to Deity at public court hearing); *Grossberg* v. *Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974) (invocation at public high school graduation); *Marsa* v. *Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) (opening invocation at borough council meetings); *Wiest* v. *Mt. Lebanon School District*, 457 Pa. 166, 320 A.2d 362 (1974) (same); *Lincoln* v. *Page*, 109 N.H. 30, 241 A.2d 799 (1968) (opening invocation by clergyman at town meeting). Of particular relevance to this case is the decision by the Supreme Judicial Court of Massachusetts in *Colo* v. *Treasurer & Receiver General*, 392 N.E.2d 1195 (1979), upholding the constitutionality of the legislative chaplaincies of the state Senate and House of Representatives.

Under these circumstances, the Court has understandably found it impossible to provide " 'bright line' guidance" for readily discerning those situations in which the Establishment Clause has been transgressed by some government involvement with matters of religion. *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 761 n.5. Nevertheless, "there has been general agreement upon the applicable principles and upon the framework of analysis" (*ibid.*). That general framework has been articulated in the form of a three-pronged test, which requires that a challenged governmental statute or action (1) "must have a secular legislative purpose"; (2) must have a "principal or primary effect * * * that neither advances nor inhibits religion"; and (3) "must not foster 'an excessive government entanglement with religion.' " *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613. The Court has found it "well to emphasize, however that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 358-359 (1975).

The wisdom of the Court's admonition concerning the limitations of the three-pronged *Lemon* test is borne out by this case, which seems ill-suited to such an analysis. The test, after all, is merely a device by which the Court seeks to divine the intended meaning and scope of the Establishment Clause. Here, that frequently useful device is simply not needed, because the intended meaning and scope of the Establishment Clause, insofar as the question presented by this case is concerned, emerges quite clearly from the history surrounding its development. This case does not involve the more typical situation in which a modern-day state law must be tested against the evils that the Establishment Clause was designed to eradicate. See, *e.g.*, *Lemon* v. *Kurtzman*, *supra*. Rather, this case involves a unique situation in which the challenged state practice is one that was engaged in by

the Framers themselves—before, during and after the fashioning and ratification of the First Amendment.

In these circumstances, analysis of the legislative chaplaincy practice under the *Lemon* test seems pointless.[15] The historical analysis above should alone suffice to demonstrate that the Nebraska chaplaincy does not run afoul of the constitutional command against "an establishment of religion." Nevertheless, a review of the legislative chaplaincy under the three-part *Lemon* test confirms that the Nebraska practice challenged in this case is constitutionally permissible.

1. *Secular Legislative Purpose.* The district court, based on the testimony and evidence presented at trial, found that the Nebraska chaplain's opening invocation

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[15] As the court recently stated when applying the four-part test to determine whether an implied cause of action has been created by a particular statute, "there is no need for us to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 34, citing *California* v. *Sierra Club*, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in the judgment). Similarly, the Court's decision just last Term in *Larson* v. *Valente*, No. 80-1666 (Apr. 21, 1982), indicates that the *Lemon* test need not be applied in all Establishment Clause contexts. *Larson* involved a Minnesota statute granting preferential treatment to the well-established churches that receive more than half of their charitable contributions from their members. Other, less entrenched religious organizations were to be subjected to various registration and reporting requirements. In striking down the statute, the Court announced that "application of the *Lemon* tests is not necessary to disposition of the case before us" (slip op. 23). Although the issue presented by this case, in which legislators merely vote their personal preference for the Office of Chaplain, in no way resembles the *statutory* classification of different religions challenged in *Larson* and is therefore not subject to the same kind of Establishment Clause analysis applied by the Court in that case, *Larson* is at least relevant to show that the Court will not slavishly adhere to the three-part test and will apply a different mode of analysis where appropriate. In this case, as indicated above, an historical analysis not only is more appropriate but is also determinative. There is no need here to "trudge through" the three parts of the *Lemon* test.

does indeed serve a secular legislative purpose: "bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner" (Pet. App. 13). See Tr. 96, 111-113, 121-123. While acknowledging that the chaplain's opening prayers may well have "a religious purpose for the chaplain and those who choose to listen for spiritual reasons," the trial court emphasized that "[t]he prayers also have a secular purpose, and it is genuine enough and strong enough to meet the constitutional measurement" (Pet. App. 14).

A similar view of opening prayers at legislative sessions was endorsed by the Supreme Judicial Court of Massachusetts in *Colo* v. *Treasurer & Receiver General*, *supra*. The court analyzed the Massachusetts legislature's chaplaincy practice under the three-pronged *Lemon* test and held with respect to the first prong now under discussion that "[t]he secular purposes of opening invocations are the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform" (392 N.E.2d at 1200).

The Eighth Circuit, too, expressed a similar sentiment with regard to the invocation at county board meetings challenged in *Bogen* v. *Doty*, 598 F.2d 1110 (1979). There, the court of appeals acknowledged the "clearly secular purpose" of "establishing a solemn atmosphere and serious tone for the board meetings" (*id.* at 1113). The court further observed that "[t]here is certainly nothing sinister in that purpose," and it could not "say that a prayer will not advance that goal" (*id.* at 1113-1114).

In this case, however, the Eighth Circuit rejected the legitimacy of such a secular legislative purpose, concluding that the purpose of the Nebraska practice "must be to advance and give preference to one religious view over others" (Pet. App. 36). The court offered nothing but conjecture to justify its conclusion, asserting that "[t]here is little other reason for singling out one minister of

one denomination for such an extended period of time * * *" (*ibid.*). It is clear, however, that the court of appeals' unsupported assumption cannot withstand reasoned analysis.

The retention of a single minister for a long period of time has no bearing on the legitimacy of the secular legislative purpose of opening each legislative session with a prayer. As explained in the testimony of State Senator Frank Lewis, Chairman of the Executive Board of the Legislative Council of the Nebraska Unicameral (Tr. 123; emphasis added):

> Dr. Palmer [the Chaplain] has had the job. He's done it in a very satisfactory way. Dr. Palmer is a personal friend, I think, of most of us. I certainly include him as one of my personal friends. You know, I don't see the necessity for changing. And particularly *the necessity would only come if anybody thought that there was an attempt to inject some kind of a religious dogma into that area, which I have not seen.*

The key point, as recognized by Senator Lewis and by the district court, is that the chaplain's secular function in opening the day's proceedings with an invocation has nothing to do with any particular "religious dogma." The chaplain does not appear as the representative of any particular church (Tr. 83). The chaplain has testified that he "never, never should, never would, never will, never have infused [his] particular religious convictions into the minds of the Senators" (Dep. 14).[16] His prayers are strictly nondenominational in character and content (Dep. 5, 7, 17-18, 35).

Thus, the fact that a single minister of a single denomination has served as the legislature's chaplain for many years is simply not relevant to the performance

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[16] "Dep." refers to pages of the deposition testimony of the Reverend Robert E. Palmer, Chaplain of the Nebraska Unicameral, taken on May 27, 1980, and admitted into evidence at trial as Exhibit No. 5 (Tr. 1).

of his secular purpose in bringing the session to order and establishing the proper tone and atmosphere for the day's proceedings. Indeed, the legislature's apparent lack of concern over the particular denomination of its chaplain actually serves to reinforce—not to detract from—the chaplain's secular legislative purpose.[17]

2. *Principal or Primary Effect.* The district court also found "as a matter of fact" that "[t]he primary effect of the prayers * * * is neither to advance nor to inhibit religion. * * * The having of prayers in the legislature of Nebraska does not have a direct and immediate effect of advancing or inhibiting religion" (Pet. App. 14). Rather, "the effect of the practice of an invocation * * * is in fact primarily secular" (*ibid.*). Whether relying "upon the opinions of the witnesses in this case as to

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[17] We note that the Massachusetts chaplaincy practice upheld in *Colo* v. *Treasurer & Receiver General, supra,* involved two Roman Catholic chaplains who had served in the state House and Senate for 24 years and 20 years, respectively. See 392 N.E.2d at 1196. It will also be recalled, as mentioned earlier, that the first eight chaplains of the United States Senate—serving over a period of 18 years—were all Episcopalians, and that several individual congressional chaplains have served quite lengthy terms—one as long as 29 years. See page 16, *supra.* The fact that the early practice of the United States Congress was to appoint a chaplain of a different denomination in each House and interchange them weekly does not undercut our analysis here. It may well be that the Founding Fathers, only recently out from under the established Church of England, desired to avoid the appearance of establishing a single denomination in the Houses of Congress. But any such concern that might have existed at that time rapidly dissipated over the years as the secular, nondenominational purpose of the opening prayer in Congress became the predominant feature. There was no longer any reason to dwell on the particular denomination of the chaplain, and the practice of interchanging chaplains of different denominations was understandably abandoned. In any event, as this Court made clear in *McGowan* v. *Maryland,* 366 U.S. 420, 431-449 (1961), an original religious purpose does not invalidate governmental action if the modern purpose has become predominantly secular. See also, *Walz* v. *Tax Commission, supra,* 397 U.S. at 687 n.8 (Brennan J., concurring).

the actual effect, or, on the other hand, upon evidence of the nature of the practice and my view of the probable consequences rationally to flow from that nature," the trial court's finding remains the same—the Nebraska chaplain's opening invocation does not have the primary effect of advancing or inhibiting religion (Pet. App. 15).

The district court found this case readily distinguishable from the "school prayer" cases, which involved impressionable young students whose attendance at public school was compulsory (Pet. App. 16-17). See *Abington School District* v. *Schempp, supra; Engel* v. *Vitale, supra.* As explained in *Colo* v. *Treasurer & Receiver General, supra,* 392 N.E.2d at 1200:

> By contrast, mature legislators may reasonably be assumed to have fully formed their own religious beliefs or nonbeliefs. The provision of a ceremonial moment of meditation at the opening of the legislative session is unlikely to advance religious belief either among the legislators or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries.

The observation of Justice Brennan in his concurring opinion in *Abington* (374 U.S. at 299-300) is also instructive in this regard: "Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." On the facts of this case, the trial court found that respondent Chambers "has had only minor inconvenience in absenting himself and has suffered no significant obloquy as a result of his nonattendance" (Pet. App. 17).[18]

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[18] Respondent Chambers' testimony at trial discloses that he routinely leaves the legislative chamber without incident prior to the chaplain's invocation (Tr. 4, 11, 32). It is worth noting, for purposes of comparison, that it is established precedent in the United States House of Representatives that the chaplain's opening prayer, although a part of the House proceedings, is not a matter of business requiring the presence of a quorum, and at-

The Eighth Circuit, in *Bogen* v. *Doty*, *supra*, 598 F.2d at 1114, held that the primary effect of the opening prayer at the county board meeting was merely "the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting." The court of appeals then stated the proposition more broadly, as a general rule: "we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion" (*ibid.*). In this case, however, the appellate court abandoned that general rule, ignored the factual findings of the trial court, and concluded without any factual support that the Nebraska chaplaincy practice has a primary effect of advancing religion and giving "preference to one religious view" (Pet. App. 36-37).

Our analysis of the court of appeals' error regarding the secular legislative purpose of the opening prayer is equally applicable here with regard to the primary effect of that prayer. Again, the court's unsupported assumption cannot survive logical scrutiny.

As discussed above, the opening prayers are strictly nondenominational (Dep. 5, 7, 17-18, 35); they typically last only one or two minutes and do not teach "religious dogma" (Tr. 11, 102, 123). The chaplain does not appear as a representative of any particular church (Tr. 83), and he does not instill his own "particular religious convictions into the minds of the Senators" (Dep. 14). Moreover, the chaplain's compensation is paid directly to him and not to any church (Dep. 4; Tr. 82), and he uses it as he would any other money that he might receive (Tr.

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tendance "is not compulsory." 60 Cong. Rec. 2592 (1921). See 6 C. Cannon, *Precedents of the House of Representatives* § 663 (1936). The 1853 Senate Report previously discussed made the same point (S. Rep. No. 376, *supra*, at 2):

> There is no compulsion exercised or attempted, upon any member or officer of either house, to attend their prayers or religious solemnities. No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend.

82). No legislator has ever even joined the chaplain's church as a result of his morning invocations (Dep. 49).

In sum, the opening prayers may well acknowledge religion, but they do not advance religion (Tr. 105-106). Rather, their primary effect is simply to accomplish the secular purpose of bringing the legislature to order in a ceremonial and traditional manner that fosters a suitably solemn atmosphere for the conduct of important legislative business (Tr. 96, 111-113, 121-123). It is of no constitutional consequence that the opening prayers might be perceived by some observers to aid religion in a general way (see Tr. 20, 107), for "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law." *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 775. See also, *e.g.*, *McGowan* v. *Maryland*, *supra* (Sunday Closing Laws sustained even though they foster respect for religious observances and facilitate attendance at church); *Walz* v. *Tax Commissioner*, *supra* (church property tax exemptions sustained notwithstanding obvious financial benefit to religious organizations); *Everson* v. *Board of Education*, *supra* (reimbursement for children's bus fares sustained despite indirect aid to church schools).[19]

3. *Excessive Entanglement.* With respect to the third prong of the *Lemon* test, the district court held that "the saying of the prayers alone entangles the state in religious affairs only nominally. The entanglement is not excessive" (Pet. App. 18). The trial record reflects that the chaplain's invocations are brief (Tr. 11, 102) and that the Legislature exercises no control or influence whatsoever over their content (Tr. 65-69; Dep. 4). Further-

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[19] The irrelevance of the fact that a single denomination has been represented in the chaplaincy over a long period of time has already been discussed and need not be repeated. See pages 16-18, 24-25, *supra*. The main point is that the invocations are nondenominational; there is thus no reason for the Nebraska Legislature to show concern for denominational variety in selecting its chaplain.

more, the process for appointing a chaplain is the same as for other legislative officers and is usually a matter of no particular concern (Tr. 115-117, 120-121). Only once, so far as the record reflects, was there any dispute or debate over the selection of a chaplain, and some of that debate was generated by the objections of respondent Chambers himself (Tr. 29-30, 83-85, 117-120).[20] In any event, the matter was quickly resolved by vote on the Senate floor; Senator Chambers' objections were rejected and Chaplain Palmer was retained (Tr. 120).

Thus, the observations of the Supreme Judicial Court of Massachusetts in *Colo* are equally applicable here (392 N.E.2d at 1200-1201, quoting *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622):

> There is no evidence that a great degree of government entanglement with religion is occasioned by the employment of legislative chaplains. The prayers offered are brief, the content unsupervised by the State, and attendance completely voluntary. There is no evidence that the State has become embroiled in any difficult decisions about which religions are to be represented or what sorts of invocations are to be offered.[21] As far as the record reveals, there is

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[20] The only "divisiveness" over the chaplaincy suggested by the record is that respondent Chambers is opposed to that legislative office and has raised his objections through general public announcement (Tr. 6-7, 77), through parliamentary maneuvers (Tr. 7, 119-120), and through this lawsuit (Tr. 4-36). Apart from Senator Chambers' objections, the record reflects only that the chaplain indirectly heard that one senator objected to the explicit Christian tone of a prayer offered by a guest chaplain (Tr. 77).

[21] As we have demonstrated, the chaplain's formal religious affiliation is irrelevant to fulfillment of his secular duties. Under these circumstances, the sort of excessive concern for denominational variety displayed by the court of appeals is, we suggest, far more likely to lead to impermissible governmental entanglement with religion than the current practice of retaining one chaplain, of whatever denomination, for as long as he properly performs his duties (see page 24, *supra*). Any requirement for periodic de-

> not the slightest hint that the practice of employing legislative chaplains has ever created any of the political divisiveness which "was one of the principal evils against which the First Amendment was intended to protect."

Nevertheless, the Eighth Circuit again summarily rejected the district court's conclusion and announced that the Nebraska chaplaincy practice "engenders serious political division along religious lines. The result is the type of excessive entanglement which must be avoided under the First Amendment" (Pet. App. 37). The main reason for the court of appeals' conclusion on excessive entanglement appears to be the use of "state monies to compensate the same minister for sixteen years" (*ibid.*). We have already answered the appellate court's mistaken views on lengthy tenure and denominational variety (see pages 16-18, 24-25, *supra*), and we will now address the question of compensation.[22]

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nominational changes, for example, would likely involve the legislature in such matters as interviewing various candidates about their religious beliefs or examining the content of their prayers. No such difficulties are engendered by the current practice.

[22] Although the district court, unlike the court of appeals, treated the salary question as an entirely separate matter, its opinion reflects agreement with the Eighth Circuit's view that payment of compensation to the chaplain is impermissible under the circumstances of this case (Pet. App. 18-21). The district court, however, held that the other elements of the Nebraska chaplaincy practice are constitutionally permissible under the three-part test, whereas the Eighth Circuit held that all elements of the practice, "taken as a whole," are unconstitutional (Pet. App. 37). We note our disagreement with the court of appeals' indivisible approach to the issues presented. Although the various elements of the chaplaincy practice are obviously related, it makes no sense to hold that the entire practice must fail if, for example, the printing of prayer books is thought to be constitutionally infirm. In any event, as previously noted (see note 11, *supra*), Nebraska did not appeal the district court's injunction against the printing of prayer books. Thus, the court of appeals surely erred when it included as part of the practice "taken as a whole" a feature no longer in issue.

There is no inherent constitutional prohibition against government payments to religious figures or institutions. As explained by Justice Blackmun in his plurality opinion announcing the judgment of the Court in *Roemer* v. *Board of Public Works*, 426 U.S 736, 746 (1976):

> It long has been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task. In *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), the Court upheld the extension of public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood acting "under the auspices of said church," *id.*, at 297, was limited by its corporate charter to the secular purpose of operating a charitable hospital.

Thus, in Justice Blackmun's words, "*Bradfield* dispels any notion that a religious person can never be in the State's pay for a secular purpose" (426 U.S. at 746; footnote omitted) (plurality opinion). Here, the State of Nebraska is merely paying a salary to one of its public officers—the Chaplain of the Nebraska Legislature. Once it is determined—as the district court found and as we have shown—that the chaplain's pay is for the performance of a predominantly secular function, there can be no constitutional objection to that payment any more than one could object to similar payments to the legislature's clerk or sergeant-at-arms.

Moreover, even if a reasonable objection could be raised to a paid legislative chaplaincy if it were a novel concept, the fact is that paid chaplaincies have been in the legislatures of this country from the very beginning—and in the Nebraska Legislature since statehood was achieved in 1867 (Pet. App. 11). It is certainly true, as this Court stated in *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." But, by the same

token, "an unbroken practice" of paid legislative chaplaincies "is not something to be lightly cast aside" (*ibid.*).

In *Walz*, the Court found that the 200-year history of church property tax exemptions showed that such exemptions were not regarded as violative of the Constitution and that no threat to religious liberty had been posed. The Court's observations in *Walz* are equally applicable here. The two-century history of paid legislative chaplaincies in this country has not "given the remotest sign of leading to an established church or religion" (397 U.S. at 678). Nor is it plausible to suggest that paid legislative chaplaincies are "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*ibid.*). If paid legislative chaplaincies "can be seen as this first step toward 'establishment' of religion, * * * the second step has been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits'" (*ibid.*).

Thus, the Nebraska Legislature's chaplaincy practice does not involve any excessive government entanglement with religion. The Establishment Clause simply does not require "complete obliteration of all vestiges of religious tradition from our public life." *Colo* v. *Treasurer & Receiver General*, *supra*, 392 N.E.2d at 1201. Rather, the courts, in grappling with the difficult and sensitive constitutional questions in this area, must demonstrate "the ability and willingness to distinguish between real threat and mere shadow." *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 308 (Goldberg, J., concurring). This Nation's experience with paid legislative chaplaincies over the past 200 years confirms that the practice certainly poses no "real threat" to religious liberty and is, at most, a "mere shadow" of a threat in the eyes of few beholders—a shadow that entirely fades away in the light of history.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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